UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 11

Docket No. DA-0752-12-0006-I-1

Quincy D. Hall,

Appellant,

v.

Department of Transportation,

Agency.

February 4, 2013

H. Jerome Briscoe III, Esquire, New York, New York, for the appellant.

Raymond A. Martinez, Esquire, Fort Worth, Texas, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member
Member Robbins issues a separate opinion concurring in part and dissenting in part.

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that affirmed the removal action. For the reasons set forth below, we GRANT the petition for review, AFFIRM the administrative judge's finding that the agency proved its charges by preponderant evidence, but VACATE the administrative judge's findings regarding nexus and penalty. We REMAND the appeal to the

Dallas Regional Office for further adjudication in accordance with this Opinion and Order.[1]

BACKGROUND

¶2 The agency removed the appellant effective September 16, 2011, from his Air Traffic Control Specialist position with the Southwest Region Air Traffic Division, Houston, Texas Intercontinental Tower, for failure to successfully complete the National Air Traffic Technical Training Program (NATTTP), which was a condition of the appellant's continued employment. Initial Appeal File (IAF), Tab 5, Subtabs 4a, 4b, 4k, Subtab 4v at 2. The appellant timely filed a Board appeal of his removal. IAF, Tab 1. He alleged, among other things, that the agency retaliated against him for his prior equal employment opportunity (EEO) activity, violated provisions of the collective bargaining agreement (CBA) and/or committed harmful procedural error in failing to reassign him to a lower level facility, and violated his due process rights. *See* IAF, Tabs 1, 10. The appellant did not request a hearing. *See* IAF, Tab 1. Based on the written record, the administrative judge affirmed the removal action, finding that the agency proved the charge of failure to successfully complete the NATTTP, that a nexus existed between the charge and the efficiency of the service, and that the penalty was reasonable. IAF, Tab 9, Initial Decision.

¶3 The appellant has timely filed a petition for review alleging, among other things, that the administrative judge improperly failed to find that a due process

[1] Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

violation occurred.[2] Petition for Review (PFR) File, Tab 1. The agency has responded in opposition. PFR File, Tab 3.

ANALYSIS

¶4 The Board has consistently required administrative judges to apprise appellants of the applicable burdens of proving a particular affirmative defense, as well as the kind of evidence required to meet those burdens. *Wynn v. U.S. Postal Service*, 115 M.S.P.R. 146, ¶ 13 (2010); *Erkins v. U.S. Postal Service*, 108 M.S.P.R. 367, ¶ 8 (2008). When an appellant raises affirmative defenses, the administrative judge must address those defenses in any close of record order or prehearing conference summary and order. *Wynn*, 115 M.S.P.R. 146, ¶ 10. If an administrative judge disposes of an affirmative defense in a close of record conference, he must identify the affirmative defense, explain that the Board will no longer consider it when deciding the appeal, and give the appellant an opportunity to object to the withdrawal of the affirmative defense. *Id.*

¶5 Here, we find that the appellant clearly alleged that the agency retaliated against him for his prior EEO activity, that the agency violated provisions of the CBA and/or committed harmful procedural error in failing to reassign him to a lower level facility based upon his failure to successfully complete the NATTTP, and that the agency violated his due process rights by: (1) the deciding official improperly considering his alleged prior misconduct and his prior training failure while previously working for the agency in Puerto Rico; (2) failing to provide specific reasons for the proposed removal action in sufficient detail for the appellant to respond; and (3) denying his request for an extension of time to respond to the proposal notice. IAF, Tab 1 at 2-5, 7, Tab 10 at 3-5. However,

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[2] On review, the appellant does not dispute the administrative judge's finding that the agency proved by preponderant evidence the charge of failure to successfully complete the NATTTP. As this finding is supported by the record evidence and the applicable law, we discern no reason to disturb it.

nowhere in the record below does the administrative judge discuss the appellant's affirmative defenses. Further, the agency's submissions did not place the appellant on notice of his burdens and the evidence necessary to prove his affirmative defenses. *Cf. Mahaffey v. Department of Agriculture*, 105 M.S.P.R. 347, ¶ 11 (2007) (remand was unnecessary, in part, because the agency's submissions put the appellant on notice of the correct burden and elements of proof necessary to establish his claims). Because the administrative judge did not inform the appellant of his burdens of proof and the means by which the appellant could prove his affirmative defenses, the appellant did not receive "a fair and just adjudication" of his affirmative defenses. *See Miles v. Department of the Navy*, 102 M.S.P.R. 316, ¶ 15 (2006). Thus, we cannot resolve this case without remanding it. *See Viana v. Department of the Treasury*, 114 M.S.P.R. 659, ¶ 8 (2010); *Miles*, 102 M.S.P.R.316, ¶¶ 15-18.

¶6 As discussed above, although the appellant raised affirmative defenses in his appeal, the administrative judge did not mention them in his close of the record summary. The close of the record summary does not reflect that the appellant withdrew his affirmative defenses. *See* IAF, Tab 7 at 2; *see also Wynn*, 115 M.S.P.R. 146, ¶ 10 (if an appellant expresses the intention to withdraw an affirmative defense, in the close of record order or prehearing conference order the administrative judge must, at a minimum, identify the affirmative defense, explain that the Board will no longer consider it when deciding the appeal, and give an appellant an opportunity to object to withdrawal of the affirmative defense). Although the appellant did not object to the exclusion of his affirmative defenses from the close of the record summary regarding the issues for adjudication, he reasserted his due process and harmful error claims in his closing brief, and the agency responded to each of the appellant's affirmative defenses in its closing brief. IAF, Tabs 9, 10. Based on the foregoing, we find that the appellant neither withdrew nor abandoned his affirmative defenses. Nevertheless, the administrative judge incorrectly stated in the initial decision

that the appellant raised no affirmative defenses. IAF, Tab 7 at 2. Because the administrative judge erred in not addressing the appellant's affirmative defenses in the initial decision, we must remand this case for further adjudication. *See England v. U.S. Postal Service*, 117 M.S.P.R. 255, ¶ 12 (2012); *Miles*, 102 M.S.P.R. 316, ¶ 18; *Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980) (an initial decision must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the administrative judge's conclusions of law and his legal reasoning, as well as the authorities on which that reasoning rests).

¶7 On remand, the administrative judge shall inform the appellant of his burdens of proof regarding his affirmative defenses and afford the parties an opportunity to submit evidence and argument on these issues. Regarding the appellant's due process claim, the administrative judge shall conduct an analysis under *Ward v. U.S. Postal Service*, 634 F.3d 1274, 1280 (Fed. Cir. 2011), and *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1377 (Fed. Cir. 1999), and the Board's subsequent decisions applying *Ward*. *See, e.g., Gray v. Department of Defense*, 116 M.S.P.R. 461, ¶¶ 5-7 (2011); *Thomas v. U.S. Postal Service*, 116 M.S.P.R. 453, ¶ 11 (2011). He must then issue a new initial decision that addresses the appellant's affirmative defenses and their effect on the outcome of the appeal, if any, giving appropriate consideration to any additional relevant evidence developed on remand. *See Viana*, 114 M.S.P.R. 659, ¶ 8.

¶8 An adverse action is sustainable only if the appellant cannot establish his affirmative defenses. *See Gath v. U.S. Postal Service*, 118 M.S.P.R. 124, ¶ 10 (2012); *England*, 117 M.S.P.R. 255, ¶ 13; 5 C.F.R. § 1201.56(b). Here, it would be premature for the Board to consider whether there is a nexus between the appellant's misconduct and the efficiency of the service and whether the agency-imposed penalty is reasonable where the administrative judge failed to adjudicate the appellant's affirmative defenses of harmful procedural error, retaliation for prior EEO activity, violation of provisions of the CBA, and denial

of due process. *See England*, 117 M.S.P.R. 255, ¶ 13. Thus, we VACATE the administrative judge's findings regarding nexus and penalty. However, if the appellant does not prevail on his affirmative defenses on remand, the administrative judge may incorporate into the new initial decision his original findings with respect to the issues of nexus and the reasonableness of the penalty of removal. *See Gath*, 118 M.S.P.R. 124, ¶ 13; *Viana*, 114 M.S.P.R. 659, ¶ 8.

ORDER

¶9 For the reasons discussed above, we GRANT the petition for review, VACATE the administrative judge's findings regarding nexus and penalty, and REMAND this case to the regional office for further adjudication in accordance with this Opinion and Order.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.

SEPARATE OPINION OF MEMBER MARK A. ROBBINS,

CONCURRING IN PART AND DISSENTING IN PART,

in

Quincy D. Hall v. Department of Transportation

MSPB Docket No. DA-0752-12-0006-I-1

¶1 For the reasons given below, I agree with my colleagues that this appeal should be remanded. Unlike my colleagues, however, I would remand for consideration of just one issue, and I would frame that issue differently from the way my colleagues frame it.

Whether the agency should have granted the appellant a second extension of time to respond to the notice of proposed removal

¶2 Where, as here, a case will be decided without a hearing, in the close of the record order the administrative judge should identify each affirmative defense that the appellant has raised but appears to have abandoned, explain that the defense will no longer be considered, and give the appellant an opportunity to object. *Wynn v. U.S. Postal Service*, 115 M.S.P.R. 146, ¶ 10 (2010). Here, the administrative judge did not identify in the close of the record order the appellant's argument concerning his request for an additional extension of time to respond to the notice of proposed removal, even though the appellant raised it in his initial submission to the administrative judge. Initial Appeal File (IAF), Tab 1 at 4-5. This argument is an affirmative defense subject to *Wynn*, although it does not concern due process because the appellant indisputably received advance notice that he was being removed for failing mandatory training and an opportunity to respond. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985). Rather, the appellant's argument that he needed a second extension of time to respond to the proposal is based on the agency's alleged failure to follow its own rules by withholding portions of his training record from him after it proposed his removal for failing training. IAF, Tab 1 at

4-5. The appellant thus claims that the agency committed a procedural error in removing him. He is entitled to reversal of his removal if he shows that the agency in fact committed a procedural error and that the error was harmful, i.e., that the agency was likely to have reached a different result in the absence of the error. *See Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 681, 685 (1991); *see also* 5 U.S.C. § 7701(c)(2)(A). In light of *Wynn*, I agree that the appeal must be remanded for consideration of this affirmative defense.

Whether the agency improperly relied on the appellant's alleged prior training failure or on uncharged misconduct in deciding to remove him

¶3 The appellant's remaining arguments on review should be disposed of at this stage, not on remand. Although the arguments were not mentioned in the close of the record order, they are not affirmative defenses subject to *Wynn*, notwithstanding the appellant's characterization of his contentions as involving due process violations. My analysis turns on *Radcliffe v. Department of Transportation*, 57 M.S.P.R. 237, 241 (1993), relied upon by the administrative judge, which holds that where, as here, successful completion of training is a mandatory condition of employment, the Board has no power to mitigate a removal for failing training unless an agency policy requires reassignment.

¶4 With regard to the appellant's argument that the agency erroneously relied on a "prior [training] failure" in deciding to remove him, thereby depriving him of his right to reassignment, the administrative judge found that agency policy and a collective bargaining agreement permitted the agency to reassign the appellant to another facility but did not require it. This finding is fully supported. *See* IAF, Tab 5, Subtab 2 at 156 & Subtab 4V at 3-4. Indeed, agency policy provides that a controller who fails training should be considered for reassignment to a lower-level facility only if he has "demonstrated the ability" to work in a "less complex" air traffic environment. IAF, Tab 5, Subtab 4V at 3. It is undisputed that, in this case, the appellant was unsuccessful when he previously worked in a lower-level facility in Puerto Rico and that the agency

issued a decision to terminate him during his probationary period on that basis. IAF, Tab 5, Subtab 4T at 2-3; Tab 10 at 6. The appellant contends that he left the position in Puerto Rico by resignation and not because of an officially-recorded training failure, IAF, Tab 10 at 1, 5, but this allegation, even if true, is immaterial; regardless of the official reason that the appellant left the earlier position, he did not "demonstrate the ability" to work in a "less complex" air traffic environment. The appellant's contention that he was wrongfully denied reassignment is an unpersuasive argument for mitigation that does not raise a due process issue.

¶5 The appellant's last argument on review is that the agency erroneously relied on uncharged prior misconduct (alleged concealment of his arrest record, alleged sick leave misuse, and alleged failure to cooperate with agency investigators) in deciding to remove him. The appellant's argument that this was a denial of due process is unavailing on its face because the appellant had advance notice and an opportunity to respond to these allegations of misconduct, which were expressly set forth in the notice of proposed removal. IAF, Tab 5, Subtab 4K. Nevertheless, the alleged prior misconduct should not have been relied upon in support of the deciding official's penalty determination because the alleged misconduct was never the subject of a formal disciplinary action that was made a matter of record and that the appellant could have disputed before a higher-level authority. *See Bolling v. Department of the Air Force*, 9 M.S.P.R. 335, 339-40 (1981).

¶6 If the allegations of prior misconduct are ignored, under *Radcliffe* the appellant's failure of mandatory training and his previous unsuccessful stint at a lower-level facility fully support the deciding official's determination to remove him. In fact, given *Radcliffe*, the Board cannot mitigate even if the deciding official's penalty selection is unworthy of deference due to his improper consideration of the alleged prior misconduct as an aggravating factor.

Other issues

¶7 The appellant claimed in his initial submission to the administrative judge that the agency removed him in retaliation for his having filed a discrimination complaint, and that the notice of proposed removal violated his due process rights because it was insufficiently detailed. IAF, Tab 1 at 4-5. The administrative judge did not mention these claims in the close of the record order, however. IAF, Tab 7. The appellant filed an objection to the close of the record order in which he asserted that the administrative judge had erroneously omitted two *different* issues; he did not object to the omission of the retaliation and inadequate notice claims. IAF, Tab 8. Moreover, the appellant never attempted to introduce evidence in support of these claims, and the administrative judge did not mention the two claims in the initial decision. IAF, Tab 11. Finally, the appellant, who has been represented by an attorney throughout this proceeding, does not argue in his detailed petition for review that the administrative judge should have addressed his retaliation and inadequate notice claims.

¶8 Under the circumstances, I do not agree with the majority's determination to raise the retaliation and inadequate notice issues sua sponte and to include them within the scope of the remand. While there may be cases in which it is appropriate for the Board to raise non-jurisdictional issues sua sponte, this is not one of them. *Wynn* is aimed at ensuring that a party who may be confused by the Board's processes is not incorrectly deemed to have abandoned an affirmative defense that he actually intends to pursue. In this case, all indications are that the appellant does not intend to pursue his retaliation and inadequate notice claims.

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Mark A. Robbins
Member